

**Progressive Building Methods, Inc. and Laborers'
International Union of North America, Local
Union No. 894. Case 8-CA-15053**

July 16, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

On April 23, 1982, Administrative Law Judge Burton S. Kolko issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order,² as modified herein.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Progressive Building Methods, Inc., Akron, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act."

2. Insert the following as paragraph 2(b) and re-letter the subsequent paragraph accordingly:

¹ In the absence of exceptions thereto, we do not pass on the Administrative Law Judge's failure to decide whether Respondent's June 2 and 18, 1981, statements to Gotto constituted violations of Sec. 8(a)(1), as alleged in the complaint.

² Member Jenkins would compute interest on the backpay ordered herein in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146, 148 (1980).

³ The Administrative Law Judge inadvertently failed to include an injunctive cease-and-desist provision in his recommended Order. We shall modify that portion of his Decision to correct that omission. Also, in accordance with our recent decision in *Sterling Sugars, Inc.*, 261 NLRB 472 (1982), we shall modify the Administrative Law Judge's Order by including therein the affirmative requirement that Respondent expunge from its records any reference to the unlawful discharge of Anthony Gotto. Respondent also shall be required to provide written notice of such expunction to Gotto and to inform him that Respondent's unlawful conduct will not be used as a basis for further personnel actions against him.

"(b) Expunge from its files any reference to the discharge of Anthony Gotto on June 19, 1981, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT discharge employees because of their union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by the Act.

WE WILL offer Anthony Gotto immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL reimburse him for any loss of earnings he may have suffered because we discharged him, together with interest.

WE WILL expunge from our files any references to the discriminatory discharge of Anthony Gotto on June 19, 1981, and WE WILL notify him that this has been done and that evidence of this unlawful discharge will not be

used as a basis for future personnel actions against him.

**PROGRESSIVE BUILDING METHODS,
INC.**

DECISION

BURTON S. KOLKO, Administrative Law Judge: The complaint alleges that Progressive Building Methods, Inc., also known as PBM (herein called Respondent), engaged in unfair labor practices under Section 8(a)(1) and (3) of the Act by laying off employee Anthony Gotto (herein called Charging Party), refusing to transfer him to another jobsite, and refusing to reinstate him, despite the availability of work he was able to perform.

The complaint was issued on September 10, 1981, upon a charge filed on July 7, 1981, by Laborers' International Union of North America, AFL-CIO, Local Union No. 894 (herein called the Union). It alleges that Respondent, through its agent and supervisor, Ron Moon, had warned Anthony Gotto, that he would probably be laid off because he had filed a grievance. The complaint further alleges that Respondent had warned the Union's business agent (Robert Allen) that Gotto would be laid off unless he dropped the grievance. By these actions, the General Counsel urges a finding of a violation of Section 8(a)(1) and (3) of the Act.

In its answer, Respondent admitted the supervisory status of Ron Moon but denied the unfair labor practice allegations. The hearing was held March 4, 1982.

Upon the entire record, particularly my observation of the demeanor of the witnesses, I make the findings and conclusions that follow.¹

Respondent's answer admits that it is an employer engaged in the construction industry as a general contractor or as a subcontractor in Northeastern Ohio and that annually it purchases goods valued in excess of \$50,000 directly from points located outside the State of Ohio. Thus, Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

The Union involved is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

Events Leading To Gotto's Layoff

Anthony Gotto was hired by Respondent around April 1, 1981, to work as a mason tender.² He had 13 years' experience in this trade. Gotto worked for Respondent at approximately six worksites. His foreman at all the sites was Ron Moon, the same person who had hired Gotto.

Sometime in May, Moon informed the workers that the vice president of PBM, Richard Burson, had refused

to pay the wage increase due to the union members that month, according to a contract agreement. Around mid-May, Gotto contacted Union Business Agent Robert Allen about Burson's refusal to pay the wage increase. Allen instructed Gotto to file a grievance. It was filed on June 1, 1981.

The following day, Gotto informed Moon that he had filed the grievance. (Moon was a friend of Gotto's and Gotto did not wish to have Moon caught off guard by the grievance.) Moon replied that he would probably have done the same thing, but that it was probably going to cost Gotto his job, and that he would probably be laid off.

On June 16, Robert Allen, the union business agent, went to see Burson to deliver Gotto's grievance and to talk about the wage increase that Burson had agreed to in the union contract. Burson remained adamant—he would not pay the increase.

On June 18, Moon approached Gotto and told him that Burson had received a copy of his grievance. Burson had told Moon that if Gotto did not drop the grievance he would be laid off. Gotto refused to drop the grievance. The next day, when Gotto arrived on the job, Moon told Gotto he had his paychecks for him, and that Gotto was to be laid off at the end of the day.

Discussion and Findings

Although Respondent did not appear at the hearing to make a defense, there is more than sufficient evidence on record to show a violation of Section 8(a)(1) and (3) of the Act. Moon, acting as an agent of Respondent, made it clear to Gotto that he would be laid off if he filed the grievance. The day after Gotto refused to withdraw the grievance he was laid off. Further, Gotto testified that there was much more work to be done on the jobsite. Frank Willis, president of the Union, Local 894, testified that he visited a PBM site that following August, and that there were nonunion men working as mason tenders at the site. Under the contract the Union had with PBM, Gotto had recall rights up to 1 year after his layoff. He had never been recalled to work at any of the PBM sites.

Gotto's work had elicited comments from Moon on two occasions, one of which was only a week before he was laid off. Both times Moon had told Gotto that things ran more smoothly with him there than they had before, that Gotto was reliable and kept the crew working.

Surely, then, there can be no reason for Gotto's layoff other than his filing the grievance. In effect, Gotto was constructively discharged. Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. By laying off Anthony Gotto because he filed a grievance with the Union against Respondent, Respondent has violated Section 8(a)(1) and (3) of the Act.
2. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

¹ Respondent chose not to participate in the hearing. In a letter to the counsel for the General Counsel dated February 26, 1982, counsel for Respondent indicated that he would not appear and that Respondent would be out of business shortly. Instead of issuing a default judgment, I felt that it was best to allow counsel for the General Counsel to present her evidence, which she did. After hearing her witnesses and oral argument, the record was closed, post-hearing briefs having been waived.

² A mason tender generally gets the job ready so that bricklayers may begin—building scaffolding, making mortar, etc.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I recommend that it cease and desist from engaging in such practices and take affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondent be required to offer Anthony Gotto immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reasons of such discrimination by payment of a sum of money equal to that which he normally would have earned as wages from the date of his discharge on June 19, 1981, to the date of his offer of reinstatement, less his net earnings during such period, with backpay computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest thereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). Respondent shall make available to the Board, upon request, all payroll and other records to facilitate checking the amount of earnings due.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³

The Respondent, Progressive Building Methods, Inc., Akron, Ohio, its officers, agents, successors, and assigns, shall:

³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and

1. Cease and desist from:

(a) Discharging employees because they utilize the grievance procedure or engage in other union or other protected concerted activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Anthony Gotto immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him in the manner described above in the section entitled "The Remedy".

(b) Post at its facility in Akron, Ohio, copies of the attached notice marked "Appendix."⁴ Copies of said notice, on forms provided by the Regional Director for Region 8, shall be signed by Respondent's representative and immediately posted upon receipt, and shall be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Respondent shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps have been taken to comply with this Order.

become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁴ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."